

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 01 March 2004

BALCA Case Nos.: 2002-INA-183, 2002-INA-184

ETA Case Nos.: P2001-PA-03370524, PP2001-PA-03370525

In the Matters of:

CHUCK'S BOAT CLUB,
Employer,

on behalf of

VASYL POPELYUKH,

and

IVAN DARUDA,
Aliens.

Certifying Officer: Richard E. Panati
Philadelphia, Pennsylvania

Appearances: John J. Gallagher, Esquire
Philadelphia, Pennsylvania
For Employer and the Alien

Before: Burke, Chapman and Vittone
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from two applications for labor certification¹ filed by Chuck's Boat Club ("Employer") on behalf of Vasyl Popelyukh and Ivan Daruda ("the

¹ Alien labor certification is governed by § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

Alien”) for the position of Landscape Gardener. (AF 27-28).² The following decision is based on the record upon which the Certifying Officer (“CO”) denied certification and Employer’s request for review, as contained in the Appeal File (“AF”), and any written argument of the parties. 20 C.F.R. § 656.27(c). Because the same or substantially similar evidence is relevant and material to each of these appeals, we have consolidated these matters for decision. *See* 29 C.F.R. § 18.11.

STATEMENT OF THE CASE

On April 26, 2001, an application for labor certification was filed by Employer on behalf of the Alien for the position of Landscape Gardener. Minimum requirements for the position included a high school degree and two years experience in the job offered. Duties of the position included landscaping and maintenance for private and business residences, as well as cleaning the grounds and repairing concrete driveways and walks. (AF 27).

On February 14, 2002, the CO issued a Notice of Findings (“NOF”) proposing to deny certification on the basis that the position was not full-time, as a landscape gardener can only perform the duties of the job during certain seasons. (AF 23-24). As such, the position could not be considered permanent because it did not involve full-time work during the entire year. Employer was instructed to submit payroll records documenting each employee’s hours worked and gross wages for the last three years. This documentation was requested to establish that the position was recurring and continuous and that employees were not forced to obtain unemployment or other jobs during the off-season. (AF 24).

Employer responded with rebuttal on March 20, 2002. (AF 12-20). Employer stated that he employed two individuals and that the positions were continuous and did

² In this decision, AF refers specifically to the Ivan Daruda Appeal File as representative of the Appeal File in both cases. A virtually identical application was filed for both Aliens and the issues raised and dealt with by the CO (*ie.*, NOF, FD, etc.) in both cases are identical.

not require supplemental income during the off-season. (AF 12). Attached were payroll ledgers for those two individuals for the past three years, demonstrating yearly net wages of approximately \$2,125.20. The ledgers indicated that the workers were paid the same wage over the course of the entire year, regardless of the season. (AF 14-20).

On March 26, 2002, the CO issued a Final Determination (“FD”) denying certification based on the ground that the position was not permanent full-time work. The CO determined that the payroll records showed gross wages of \$100.00 per week paid annually; the CO found that this was too low for full-time work and subsequently determined that the position was not full-time year-round. (AF 8-9).

On April 26, 2002, Employer filed a request for review of the denial of certification. (AF 1-7). Employer argued that he had purchased new land and planned to hire the Alien to landscape and maintain this property. (AF 1). Employer enclosed real estate tax notices for various pieces of property. (AF 2-7).

The matter was docketed in this Office on May 17, 2002 and Employer filed a Brief on June 12, 2002. Employer argued that he had provided the requested payroll records, but the CO denied certification. Employer stated that past employment history was not sufficient to deny labor certification when he could otherwise prove that this was a bona fide job opportunity. Employer once again argued that he had purchased land which he intended the Alien to landscape. Employer further claimed that there was no documentation which could prove that the position was full-time and not seasonal employment and therefore certification should not be denied on this basis.

DISCUSSION

This matter is governed by *Vito Volpe*, 1991-INA-300 (Sept. 29, 1994) (*en banc*). As held in *Vito Volpe* and recently affirmed in *Crawford and Sons*, 2001-INA-121 (Jan. 9, 2004) (*en banc*), a landscape gardener position for which duties can only be performed during approximately nine to ten months per year cannot be considered permanent

employment for the purposes of labor certification. Rather, this employment should be considered seasonal employment. An employer's method of payment (either only during the working months or continuous throughout the entire year) bears no relevance on this determination. The payment of wages continuously throughout the course of the year does not cure the defect. Employer has not demonstrated that the job duties can be performed year-round. As such, the position is seasonal employment and labor certification was properly denied.

ORDER

The Certifying Officer's denial of labor certification is hereby AFFIRMED.

Entered at the direction of the panel by:

A

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within ten days of the service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of the petition the Board may order briefs.